



**A•S•U**

**IN THE FAIR WORK COMMISSION**

**Matter No.: AM2018/26**

**S 156 - Four yearly review of modern awards - Social,  
Community, Home Care and Disability Services Industry Award  
2010**

**SUBMISSION OF THE AUSTRALIAN SERVICES UNION**

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**Submitter:** David Smith, National Secretary  
**Organisation:** Australian Services Union  
**Address:** 116 Queensberry Street  
Carlton South, Victoria, 3053  
**Phone:** 03 9342 1400  
**Fax:** 03 9342 1499  
**Email:** [info@asu.asn.au](mailto:info@asu.asn.au)  
**Date:** Tuesday 19 November, 2019

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1. This submission is made in response to the directions issued by the Fair Work Commission on 23 October 2019 in relation to the Tranche 2 proceedings in the Four yearly review of the *Social, Community, Home Care and Disability Services Industry Award 2010* (**'the Award'**).

## **I - INTRODUCTION**

### **Claims pressed by the Australian Services Union**

2. The Australian Services Union (**'ASU'**) presses three claims in the Tranche 2 proceedings. These are:
  - a. a 15 per cent broken shift penalty rate,
  - b. paid travel time for home care and disability services workers, and
  - c. recall to work overtime away from the workplace.
3. The ASU supports the claims of the Health Services Union (**'HSU'**) and the United Workers Union (**'UWU'**).

### **Claims opposed by the Australian Services Union**

4. The ASU opposes the following claims in made by Australian Business Industrial (**'ABI'**) and others.
  - a. change of roster,
  - b. client cancellation, and
  - c. remote response and recall to work overtime.
5. In respect of client cancellation, the ASU supports also UWU's submission that the term does not meet the modern awards objective and should be deleted.

## **II – GENERAL FINDINGS**

### **Relevant findings from the 2 September Decision**

6. The following findings from the decision in dated 2 September 2019<sup>1</sup> (**'2 September decision'**) are relevant to these proceedings.
7. In the 2 September Decision, the Full Bench referred to August 2016 Census data (at [25]) showing that:
  - a. there were around 168,000 employees in the social, community, home care and disability services (**'SCHDS'**) industry;

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<sup>1</sup> [2019] FWCFB 6067.

- b. 73 percent of SCHDS industry workers are female (compared to the all industry average of 50 percent);
  - c. SCHDS industry workers are significantly older than the all industries average;
  - d. SCHDS industry workers are more likely to be part-time employees than the all industry average (50.3 percent compared to 34.2 percent);and
  - e. SCHDS industry workers work fewer hours than the all industries average.
8. The Full Bench also found (at [47]) that some employees covered by the SCHCDS Award may be regarded as “low paid” within the meaning of s.134 (1) (a). The evidence before the Commission is that Social and Community Services (**‘SACS’**) Employees are paid according to the SACS Equal Remuneration Order (**‘ERO’**). Although in a number of instances in the employers’ evidence there were enterprise agreements governing the employment of the employees, these agreements do not provide for rates of pay in excess of the ERO. Employees covered by other classifications streams may be covered by enterprise agreements, but wages remain very close to the award minimum. The needs of the low paid must be taken into account by the Commission.

## **The Disability Sector**

### Increasing precariousness of work in the disability services

9. The Commission would find that work in the disability services is becoming increasingly precarious. This change in the industry has significant adverse effects on employees in the sector, contributing to an extreme turnover rate.
10. Firstly, the rate of casual employment in disability services is increasing. The National Disability Services Australian Disability Workforce Report of July 2018 (**‘NDS Report’**) reporting that 46 percent of disability support workers are casuals. Dr Stanford’s analysis of this data shows that new employment in the sector is being driven almost entirely by a growth in casual employment. The growth in casual employment in the sector was 26 percent per year, compared to just a 1.3 percent per year increase in permanent employment.<sup>2</sup>
11. Further, casualization is not the only challenge faced by workers in the industry. Dr Stanford stresses that precarious work practices are becoming increasingly common for all disability support workers. Average hours of work are low and highly variable. Some workers work very short hours, and many workers experience regular fluctuations in their hours of work.<sup>3</sup> There is an increase in part-time employment, irregular and discontinuous shift assignments, and the requirement to work in multiple locations. Work is regularly performed in private homes.

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<sup>2</sup> Stanford, p 12.

<sup>3</sup> Stanford, p 11.

Workers are also increasingly expected to provide transportation services, usually in their own vehicle.<sup>4</sup>

12. The Commission should also find that the increasingly unpredictable nature of the industry has clear adverse impacts on employees.
13. In his original qualitative research, Dr Stanford recorded elevated levels of mental and physical stress being suffered by workers, which the workers attributed to the instability and precariousness of their work.<sup>5</sup> Dr Stanford reports:

*Multiple interviewees reported the great difficulties of managing very unstable and unpredictable shift and roster schedules, and balancing the demands of such unpredictable work with their other family and community responsibilities.*<sup>6</sup>

14. The Commission should also find that the findings from Dr Stanford's qualitative research reflect the general scientific consensus about the impact of irregular and unpredictable work.
15. Dr Muurlink, in his review of the literature, explains that unpredictable work presents challenges to health and wellbeing. There are structural challenges to health, where employees are less able to engage in positive health behaviours or access health services. There are also physical and psychological challenges to health, which include the adverse effects of change, reduced rhythmicity, or a diminished sense of control.<sup>7</sup> These adverse effects may be compounded by the conjunction of irregular work with a lack of job security and underemployment.<sup>8</sup>
16. Dr Muurlink also notes that control and change are the two key psychosocial dimensions of work, which have significant predictive power in determining a wide variety of health outcomes. Control is particularly relevant for staff in relatively junior positions within care settings, and for these staff, I recommend particular care is taken with interfering with the predictability of work, as it is likely to compound existing problems associated with uncontrollability in the workplace.<sup>9</sup>

#### Labour and skills shortages in the SCHDS Industry

17. The Commission would also be satisfied that disability support work is skilled work, but that the industry is struggling to attract sufficient new staff
18. Dr Stanford explained in his expert report that a common misperception about work in disability services is that it is unskilled and that disability services workers do not need any

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<sup>4</sup> Stanford, p 6.

<sup>5</sup> Stanford, p 14.

<sup>6</sup> Stanford, p 15.

<sup>7</sup> Muurlink, pp 4-5.

<sup>8</sup> Muurlink, p 9.

<sup>9</sup> Muurlink, p 17.

special qualifications. However, the Productivity Commission found that 89 percent of employers in the disability and personal care field indicated that a certificate-level qualification was essential for the job.<sup>10</sup> He went on to say that:

*This stands in contrast to the view of clinicians, social workers, disability specialists and participants themselves: namely, that this work requires sophisticated communications skills, a high level of emotional intelligence, and (depending on the complex and varied needs of the participant) specialist knowledge (for example, in relation to particular medical conditions, dealing with challenging behaviour, or understanding the side-effects of medications). In addition to multiple and complex needs, people with disabilities may also need support in managing multiple and complex interactions with government and non-government agencies in the course of addressing their housing, medical, and educational support needs<sup>11</sup>.*

19. The Commission would find on the evidence that disability services requires a large number of skilled, qualified and experienced staff, but is struggling to retain and existing staff and attract sufficient numbers of new employees with the requisite skills.
20. The rollout of the NDIS is anticipated to ultimately increase employment in the disability services by some 70,000 full-time equivalent positions, or a doubling of the workforce in the sector.<sup>12</sup>
21. Dr Stanford describes the severe difficulties in recruiting new staff to even maintain existing operations, let alone scale up to the dramatic degree implied by forecasts of fully rolled out NDIS operations.<sup>13</sup> Dr Stanford notes that this means the sector is not recruiting enough staff to meet its needs. The NDS database indicates that four-fifths of all agencies attempted to hire new staff during the March 2018 quarter. Of those, nearly one-third were unable to fill all the vacancies they advertised for, and unfilled positions accounted for 25 percent of all advertised positions. Some agencies advertise permanently for new recruits, with no limit on hiring – in essence hiring all the new staff they can find.<sup>14</sup> Many of these vacancies remain unfilled due to a lack of suitable candidates. In the March 2018 quarter, 43% of employers with unfilled vacancies cited an absence of suitable qualified candidates as the main reason for their unsuccessful recruitment effort, a sharp increase from the 29% of employers who answered a similar question the previous year.<sup>15</sup>

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<sup>10</sup> Stanford, p19

<sup>11</sup> Stanford, p 18.

<sup>12</sup> Stanford, p 7.

<sup>13</sup> Stanford, p 13.

<sup>14</sup> Stanford, p 29.

<sup>15</sup> Stanford, p 29.

22. Turnover of employment is unusually high. Dr Stanford notes that over one-quarter of workers change jobs in the course of a year. That is approximately three times higher than the average turnover rate in the overall Australian labour force.<sup>16</sup>
23. The Commission should also find that the staffing shortage in the industry is caused, in part, by the low conditions of employment and intolerable working conditions common to disability services.
24. Dr Stanford's research shows that existing staff report dissatisfaction with conditions of work in the industry, and a growing risk of departure from the sector.<sup>17</sup> Many of the front-line workers interviewed by Dr Stanford and his colleagues were considering leaving the industry altogether in response to intolerable insecurity and deteriorating conditions.<sup>18</sup> Workers are leaving the sector because of the experiencing increased instability and precariousness in their jobs, elevated levels of mental and physical stress, and irregular hours and incomes.<sup>19</sup>
25. Dr Stanford notes that skilled workers appear to be unwilling to join the sector due to the intolerable conditions of employment. Dr Stanford believes that it is impossible to imagine that the requisite number of qualified, skilled and motivated workers could be attracted to this industry, given the unappealing or even intolerable conditions and insecurities which they would face in their new jobs.<sup>20</sup> Some new workers joined the sector reluctantly.<sup>21</sup>
26. The shortage of skilled staff will have a significant impact on quality of care.
27. The shortage of skilled workers will have an impact on the quality of care provided to NDIS participants. As noted above, skilled workers are leaving the industry. New recruits to the industry have considerably less training and qualifications than the existing workforce.<sup>22</sup> The majority of new workers recruited to work in the sector do not possess any formal qualification in disability services work.<sup>23</sup> This challenge has been exacerbated by inadequate conditions of work in the sector: most workers are engaged in casual, part-time, and irregular positions; staff turnover is high; and there has been a consequent reduction in the availability of training, including in-house supervision and support.<sup>24</sup>
28. It is likely that the sector's recruitment and training difficulties will become more acute over time, as the demand from NDIS participants grows, as the sector becomes even more casualised, as disability service jobs become even more precarious, and as the existing cadre

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<sup>16</sup> Stanford, p 11.

<sup>17</sup> Stanford, p 11.

<sup>18</sup> Stanford, p 7.

<sup>19</sup> Stanford, p 14.

<sup>20</sup> Stanford, p 18.

<sup>21</sup> Stanford, p 14.

<sup>22</sup> Stanford, p 28.

<sup>23</sup> Stanford, p 28.

<sup>24</sup> Stanford, p 13.

of more experienced and skilled workers continues to exit the industry.<sup>25</sup> Dr Stanford and his colleagues identified the instability of employment arrangements and the low wages as key barriers inhibiting current and prospective disability support workers from accumulating more formal training.<sup>26</sup> The industry needs to stabilise its workforce and reduce turnover. It can only do this if it makes working in the sector more appealing.<sup>27</sup>

29. In his oral evidence, Dr Stanford magisterially summarised the challenges faced by the disability services:

*In terms of the aggregate data the evidence is very clear that workers do not feel that the current conditions of work, the instability of hours that they face, and the compensation, the effective compensation which they receive, are adequate to maintain this as their career path. So the overall turnover rates in this sector are very high according to the NDS database. One in four workers in the sector changes their job in the course of a year and that's a turnover rate approximately three times as high as for the labour market as a whole. We also see evidence of the departure of senior workers. Our qualitative interviews highlighted that many longstanding employees in the industry as the structure of service delivery changed under the NDIS found the turmoil and instability of their work intolerable and that was contributing to their departure from the career as well. The inability of the industry to attract, first of all, enough workers period but, secondly, workers with the skill level that most experts in the sector think is essential is also clear. We had the data that I mentioned from NDS on the number of vacant positions that can't be filled. We also have data from the NDS about the relatively low levels of formal qualifications of the workers who are attracted. So put all of that together, quantitative and qualitative indicators, we see an industry that needs to grow but isn't able to maintain its current workforce let alone attract in significant numbers the new workers with the skills that are going to be required to live up to the mandate that the NDIS undertook.<sup>28</sup>*

30. The weakness of the SCHDS Award in addressing these problems of instability and unpredictability in working arrangements is clearly facilitating the further fragmentation and destabilisation of work in the sector.<sup>29</sup>
31. However, employers in the sector are not adapting their work practices to address this problem. This is because there are few incentives for them to adopt more farsighted work practices. In Dr Stanford's experience in labour economics:

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<sup>25</sup> Stanford, p 27.

<sup>26</sup> Stanford, p 22.

<sup>27</sup> Stanford, p 22.

<sup>28</sup> Transcript 17 October 2019, PN 2285

<sup>29</sup> Stanford, p 25.



...simply showing employers that they do get some benefits from a more satisfied workforce that feels it's been treated fairly, a workforce that's able to combine its work life with its family life is not always enough to elicit respect or do attention to those goals unless there's also some more tangible profit and loss related considerations that come into play. That's why we have labour regulations and benchmarks and norms because leaving it up to the voluntary wisdom and willingness of employers to do the right thing has not been reliable.<sup>30</sup>

32. As Dr Stanford goes on to say:

*Right now the pressure, if you like, or the incentive is indirect only from an employer that is enlightened enough to realise that a more satisfied employee is more likely to be a long-term and motivated employee.<sup>31</sup>*

### III – CLAIMS PRESSED BY THE AUSTRALIAN SERVICES UNION

#### Broken Shift Penalty Rate

##### Previous Submissions relied upon by the ASU

33. The ASU relies on our Submission of 18 February<sup>32</sup> and our Submission in Reply dated 2 October 2019.<sup>33</sup>

##### Court book, transcript and exhibits relevant to the claims

34. The following material is relevant to this claim:

Parts of the Court Book, exhibits, and transcripts relevant to this claim	EX. no	Reference
Expert Report of Dr Jim Stanford	ASU4	
Oral Evidence of Dr Jim Stanford		PN2216-PN2289
Court Book – Predictability and control in working schedules by Dr Olav Muurlink		CB 1686
Court Book - ELRR – Wage Theft, underpayment and unpaid work in marketised social care – by F McDonald, D Bentham and J Malone		CB 2772
Court Book – Statement of Augustino Encabo dated 13 February 2019		CB 1137
Court Book – Statement of Richard Rathbone dated 13 February 2019		CB 1171

<sup>30</sup> Transcript 17 October 2019, PN2282.

<sup>31</sup> Transcript 17 October 2019, PN2275.

<sup>32</sup> CB 1002.

<sup>33</sup> CB 1126.

Court Book – Statement of Tracy Kinchin dated 24 June 2019		CB 1190
Statement of Robert Steiner dated 15 October 2019	ASU2	
Oral evidence of Robert Steiner		PN1534-PN1613
Statement of Scott Harvey dated 2 July 2019	ABI17	CB 162
Oral evidence of Jeffrey Sidney Wright		PN2543-2570, 2619
Court Book – National Disability Services – Australian Disability Workforce Report		CB 1828
Court Book – NDIS Costs Productivity Commission Paper		CB 1884
Court Book – NDIS Price Guide 2019-2020		CB 2796
Witness Statement of Deborah Gaye Ryan dated 12 July 2019	ABI16	CB190
Oral evidence of Deborah Gaye Ryan		PN3050, 3086- 3092
Oral evidence of Mr Steven Miller		PN2034-PN2069

### Findings Sought

#### *Breaking shifts is a common practice in the disability services*

35. The Commission should be satisfied on the evidence that disability employers routinely break the shifts of disability services employees. The Award does not regulate the number of breaks within a shift, does not regulate the length of any breaks, and does not impose any minimum engagement for the broken periods of the shift. Employers can, and do, schedule an unlimited number of engagements, closely tailored so that only time spent directly with a client is paid time. This eliminates the need to pay for time spent travelling to, from, and between clients, or waiting on the next client.

36. Dr Stanford described the results of his original qualitative research:

*Multiple interviewees reported the great difficulties of managing very unstable and unpredictable shift and roster schedules, and balancing the demands of such unpredictable work with their other family and community responsibilities. The assignment of DSWs to work discontinuous shifts, often in diverse locations, greatly exacerbates the personal cost and stress of this instability in work. The time spent in traveling to and from work under these split or broken shifts, and the often wasted time between these short periods of work, has the effect of greatly reducing the*

*effective hourly income associated with this work – as well as imposing considerable stress on the workers and their families.*<sup>34</sup>

37. Mr Robert Steiner, a full-time disability support worker, explains his experience of working in the disability services:

*I am sometimes rostered to work a broken shift. If I work multiple shifts in one day it is most likely because I am working at multiple locations. My employer does not pay me for the time I spend travelling between work locations.*

38. Mr Steiner set out in his statement how frequently he worked broken shifts.<sup>35</sup> In the period between November 2018 and June 2019, he worked 21 broken shifts. What is striking about Mr Steiner's roster is the extreme irregularity of his roster. His starting times and finishing times show no predictable pattern, and he is engaged for as little as one hour on a day.<sup>36</sup>

39. By breaking shifts employers increase the length of the working day without increasing the employee's remuneration. The impacts on full-time employees are particularly acute because their employer is obliged to roster an average of 38 hours each week.

40. In the period between November 2018 and June 2019, Mr Steiner's hours of duty ranged between 8.5 hours and 15 hours each day (excluding travel to and from home). The duration of the unpaid breaks between his shifts ranged between 1 hour and 5.5 hours.<sup>37</sup>

41. However, even part-time employees end up working longer hours when their shifts are broken. Mr Richard Rathbone, a part-time disability support worker, attaches his roster to his statement for the six weeks between 29 October and 16 December 2018. He works broken shifts almost every day he is rostered to work. Mr Rathbone explains that working broken shifts means working long hours:

*If I have a long break between shifts it means that I am working a very long day. I will start early in the morning and usually finish around 7.00PM.*<sup>38</sup>

42. Mr Rathbone explains that a significant problem with working broken shifts is the wasted time. Mr Rathbone believes longer breaks permit more time for chores and activities.<sup>39</sup> However, longer breaks also extend his working day, which he finds exhausting.<sup>40</sup> When Mr Rathbone is not travelling between clients, short breaks a particular problem because they are too short to do anything useful, so this is truly dead time.<sup>41</sup>

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<sup>34</sup> Stanford, pp 14-15.

<sup>35</sup> Steiner, [15].

<sup>36</sup> Steiner, Attachment A.

<sup>37</sup> Steiner, [16], Attachment A.

<sup>38</sup> Rathbone, [31].

<sup>39</sup> Rathbone, [30].

<sup>40</sup> Rathbone, [31].

<sup>41</sup> Rathbone, [29].

43. Workers in this sector are underemployed and accept intolerable working patterns to increase their income. Mr Encabo represents many workers in the disability services when he says:

*I am always trying to get more hours so I can earn more money. The breaks in my shifts just mean I have to work more hours and longer spans of hours to make the same money I would if I was rostered continuously. I work very long hours, and this is very tiring.*<sup>42</sup>

44. However, employees can only tolerate this pattern of work for so long. Mr Rathbone reports that despite his commitment to disability work,<sup>43</sup> he has '*reached his used by date in the disability sector*'. He '*wants to work in an industry where he can earn the same or more money with a more compact working day*'.<sup>44</sup>

*The current scheme of the Award promotes inefficient and unproductive performance of work*

45. The Commission would find from the evidence, especially the extreme turnover rate and the struggle to attract skilled workers to disability services, that the Award does not promote efficient and productive performance of work. Indeed, the Award permits employers to take the path easy low road, even if it will be to their detriment in the long term.
46. The practice of breaking shifts as transfers costs, burdens and risks from the employer to the employee. By breaking shifts employers are able to avoid the burden of delays, downtime and paying for travel time. The lack of regulation of broken shifts promotes inefficient and unproductive work practices. Consequently, these trends are relevant to relevant to the Commission's consideration of s.134 (1) (d) of the FW Act – *the need to promote flexible modern work practices and the efficient and productive performance of work*.
47. Continuous patterns of work are consistent with '*the efficient and productive performance of work*'<sup>45</sup> and are an appropriate alternative to multiple broken shifts. Rostering patterns that include multiple broken shifts within a span of hours up to 12 hours are inconsistent with the consideration.
48. Dr Stanford notes that the hyper-flexibility permitted by the SCHDS Award in shift scheduling, short assignments, broken shifts, and required but uncompensated travel time serves to eliminate the incentive or pressure on employers to try to organise work in the most efficient and stable manner. This means that employers have little, if any, incentive to avoid scheduling work in small, discontinuous blocks or to geographically plan the assignment of appointments to minimise travel time. The Award does not currently place any worth upon the disruption and uncompensated time of workers, which means it is not treated with value and used efficiently.

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<sup>42</sup> Encabo, [32].

<sup>43</sup> Rathbone, [10]-[14].

<sup>44</sup> Rathbone, [35].

<sup>45</sup> S134 (1) (d) of the modern awards objective.

49. As Dr Stanford explained in his oral evidence: *'It's clearly more optimal for a worker to have a series of visits organised effectively in terms of their geography and in terms of their timing to minimise the total amount of transportation time and the potential downtime between visits'*.<sup>46</sup> However, without genuine incentives use labour in an optimal manner (from the perspective of both parties), managers will not do so.<sup>47</sup>
50. The unrestricted capacity to break shifts, and the absence of any obligation to pay for travel time, permits employers to roster staff over extremely wide areas. Mr Robert Steiner is a full-time disability support worker employed by a regional disability services provider. His employer operates over a wide area of regional New South Wales. Mr Steiner can be required to travel up to 84 kilometres from Newcastle to Singleton. This involves a drive of at least one hour, but may be longer if there is traffic. Mr Steiner is regularly on duty for much longer than the time he paid for; often working for more than 10 hours in a day, because his employer uses clause 25.5 to break his shifts to avoid paying for travel time.
51. Ms Kinchin is also full-time disability support worker. Ms Kinchin's evidence puts in sharp contrast the different between working pattern with broken shifts and working pattern without broken shifts. Before May 2019, she was rostered to work her ordinary hours continuously without breaks. She received her roster two weeks in advance, which set her starting and finishing times for each day. She attended her employer's workplace to collect a vehicle and then attended clients as directed by her employer. Her day involved approximately one hour of administrative work and seven hours of client-facing activity with travel in between.<sup>48</sup> Where there was spare time in her roster, she could attend to administrative and other tasks.
52. After May 2019, her employer elected to break her shifts so that she was only rostered for client facing work.<sup>49</sup> Her employer also broke her shifts so that she was not paid for travel between clients.<sup>50</sup> As a consequence, Ms Kinchin's roster was changed each time a client requested a change in their service.<sup>51</sup> She longer has time in her roster for administrative and other work related tasks. She reported working very long days as a consequence of breaking shifts. She would work her eight hours over a span of up to 10 hours.<sup>52</sup> Her working day has increased in length, but her remuneration has not.<sup>53</sup>
53. This is clearest where the breaks between paid periods of work are very short. Mr Augustino Encabo, a disability support worker, routinely has his shifts broken for as little as 15 minutes while he is travelling between clients. He is sometimes paid a 15 minute allowance for travel between clients. However, this does not count as part of his hours of work, so it does no

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<sup>46</sup> Transcript 17 October 2019, PN 2271

<sup>47</sup> Transcript 17 October 2019 PN2285.

<sup>48</sup> Kinchin, [13]-[14].

<sup>49</sup> Kinchin, [18].

<sup>50</sup> Kinchin, [16].

<sup>51</sup> Kinchin, [18].

<sup>52</sup> Kinchin, [18].

<sup>53</sup> Kinchin, [17].

contribute towards leave accruals or overtime: reducing the employer's costs and increasing the amount of time he must work before being paid overtime.

54. Mr Rathbone's roster also includes routine short unpaid breaks that align with travel between clients. For example, on Thursday, 8 November, he was rostered to work between 8.00am and 2.30pm, with a 30 minute break between his appointments with his first and second clients.<sup>54</sup> Mr Rathbone is sometimes paid a 15 minute travel allowance, like Mr Encabo, but not always.
55. It should be inferred that these very short unpaid breaks are spent travelling, and even if they are not, they are clearly dead time. The Commission should also infer that employers in the are already accurately estimating the travel time between work locations so as to calculate the duration of the unpaid breaks.
56. The Commission should not be persuaded that the irregular and disruptive working patterns described above are simply result of employers catering to client demands. Dr Stanford explained in his oral evidence that the disability services is much like any other market system:

*It is certainly true that agencies and providers in this industry face a number of pressures and constraints in structuring their work and the rostering. One of those is the desire and preferences of the individual clients, but there are other factors which influence their decisions in this regard including minimising their own costs and making it convenient for management to perform their management function, reducing financial or operational risks to the agencies, so I would not accept that this whole pattern of work that we've portrayed in our research is the result of organising work solely to meet the preferences and choices of NDIS participants.<sup>55</sup>*

57. Service providers decide what services they will provide, including the times at which they will provide services, and the length of such services.<sup>56</sup> Several employer witnesses concede that they attempt to provide continuous work broadly because such a pattern of work is efficient, consistent with the productive performance of work and preferred by the worker.<sup>57</sup>
58. ABI's witness, Ms Ryan, the Chief Executive Officer of NDIS provider Community Care Options Ltd, complains that the NDIS caused the organisation '*increased work pattern inconsistency and a higher rate of turnover*'.<sup>58</sup> However, she does not provide any detail about the financial health of the organisation or any detail to substantiate the connection between the NDIS and the work patterns her organisation chooses. She does acknowledge that

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<sup>54</sup> Rathbone, Annexure B.

<sup>55</sup> Transcript 17 October 2019, PN2251.

<sup>56</sup> Harvey, [56] – [59]; Transcript 17 October 2019, PN2547-2550 [Jeffrey Sidney Wright].

<sup>57</sup> Wright, [41]; Transcript 17 October 2019, PN2619 [Jeffrey Sidney Wright]; Transcript 18 October 2019, PN3050 [Deborah Gaye Ryan]; Mason, [71].

<sup>58</sup> CB, 195.

rostering broken shifts is '*not good practice for us*'.<sup>59</sup> She says her organisation tries to roster in morning and evening runs. She '*hopes*' that there will be no more than one break. Her organisation also tries to negotiate with clients to ensure that employees can be rostered continuously.<sup>60</sup>

59. ABI's witness, Mr Harvey, Operations Manager of NDIS provider Connectability, gives evidence that his employees are rostered continuously whenever possible.<sup>61</sup> They also ensure their profitability by only providing services to clients who can commit to at least 8 hours service each week.<sup>62</sup> Mr Harvey could not provide any detailed evidence about the impact of the ASU claim on his organisation's operations.
60. NDS's witness Steven Miller gave evidence that he instructs his rostering staff to avoid rostering broken shifts wherever possible.<sup>63</sup> However, he could not quantify the incidence of broken shifts in his business or give any detailed evidence about the impact of the ASU claim on his business.<sup>64</sup>
61. However, not all employers seek to minimise broken shifts. Ms Wang, of CASS Care Limited, gives evidence that 80 to 90 percent of her permanent part-time disability services employees work broken shifts.<sup>65</sup>
62. These disruptive and irregular working patterns have a clear impact on the quality of care provided to clients. Dr Stanford explains that DSWs who work broken shifts in multiple locations rarely attend a central office or agency site, which prevents them from accessing information about clients or conferring with colleagues on treatment strategies.<sup>66</sup> This is reflected in the evidence of Mr Encabo, Ms Kinchin, Mr Rathbone, and Mr Steiner who state that they rarely attend their employer's premises
63. However, the impact on client care goes beyond on-the-job supervision and professional development: the sector is struggling to train its employees. Dr Stanford explains that for a workforce that is low-paid and works a limited number of hours, there are significant barriers to enrolment and completion of vocational qualifications.<sup>67</sup> His original research with Dr Ryan, on the unmet skills needs of the disability services sector, he identified the instability of employment arrangements and low wages as key barriers inhibiting current and prospective disability support workers from accumulating more formal training.<sup>68</sup>

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<sup>59</sup> Transcript 18 October 2019, PN3091.

<sup>60</sup> Transcript 18 October 2019, PN3086-PN3092.

<sup>61</sup> Harvey, [57].

<sup>62</sup> Harvey, [59].

<sup>63</sup> Transcript, 18 October 2019, PN2039.

<sup>64</sup> Transcript 17 October 2019, PN2042-2071.

<sup>65</sup> Transcript 18 October 2019, PN3515-PN3518, PN3541-3542, PN3557.

<sup>66</sup> Stanford, p 31.

<sup>67</sup> Stanford, p 20.

<sup>68</sup> Stanford, p 21.

64. This is a particular problem, given the sector's significant problems attracting and retaining a sufficient number of skilled staff.

*Breaking shifts causes significant negative impacts on employees' health and well-being*

65. The Commission would find that long and irregular hours associated with working broken shifts interfere with the employee's work/life balance and negatively impact the employee's health and wellbeing.

66. Dr Muurlink explains that without a regular rhythm or 'beat' work interferes with work/life balance, which has significant effects on employees' health and wellbeing. If work is predictable, then it can be synchronised with health behaviours.<sup>69</sup> Dr Muurlink contrasts the increasingly complex working week, which features night work, shift work, weekend work, overtime, compressed working weeks and on-call patterns, with the relatively predictable and steady beat of non-working life, such as Saturday sport, children's school hours, television or public transport scheduling.<sup>70</sup> Unpredictable or irregular work may also interfere with access to health maintenance services such as gyms, quality food options or medical facilities.<sup>71</sup>

67. Further, an employee's perception of their control over their hours of work has an impact on their wellbeing. Dr Muurlink explains that work stress defined as a combination of work demand with work control and a significant component of this sense of control relates to control over work hours.<sup>72</sup> He explains that workers who judge their work environment as more controllable report reduced work-life conflict and superior psychological well-being. Strain was associated with cognitive and physical workload perceptions. Sense of control has also been strongly associated with another, less direct marker of wellbeing: intention to leave the profession and absenteeism.<sup>73</sup>

68. Dr Stanford found in his original research that:

*The assignment of DSWs to work discontinuous shifts, often in diverse locations, greatly exacerbates the personal cost and stress of this instability in work. The time spent in traveling to and from work under these split or broken shifts, and the often wasted time between these short periods of work, has the effect of greatly reducing the effective hourly income associated with this work – as well as imposing considerable stress on the workers and their families<sup>74</sup>.*

69. Dr Stanford notes that breaking shifts facilitates the fragmentation and disruption of normal work schedules, complicates the challenges facing disability service workers to maintain

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<sup>69</sup> Muurlink, p 5.

<sup>70</sup> Muurlink, p 4.

<sup>71</sup> Muurlink, p 6.

<sup>72</sup> Muurlink, pp 6-7.

<sup>73</sup> Muurlink, p8.

<sup>74</sup> Stanford, pp 14-15.



health work-life balance, and undermines their effective hourly compensation. He also explains that time between portions of broken shifts typically occurs at sub-optimal locations and times of the day, thus preventing workers from experiencing full value of the time.<sup>75</sup>

70. When her hours of work were stable, Ms Kinchin reported a high level of satisfaction with her work, because the regularity of her hours of work permitted her to plan her life with certainty. She was able to participate in the community, see friends and plan holidays.<sup>76</sup> In contrast, after her employer imposed broken shifts Ms Kinchin reports that the negative impact the employer-imposed broken shifts was so significant that she took stress leave.<sup>77</sup>

71. Mr Rathbone regularly misses weekday meals with his family and quality time on the weekend.<sup>78</sup> He finds it hard to maintain friendships because his irregular working hours mean that he is working when most people would be available (weekends and early evenings).<sup>79</sup>

72. Mr Encabo also struggles to balance work and his family life. He explains:

*The breaks between shifts are also a problem. Often, there is not enough time to go home from work and then get to the next workplace. Other times it's just not cost effective to go home because of the cost of fuel. If I can't go home, I will I would head to the library to read for a bit. This is not what I really want to do with my time; it's just all I can do in the time available. If I am able to go home, I am usually only there for about an hour after travelling between clients. It's not really enough time to do anything useful or have a real rest.<sup>80</sup>*

73. Mr Encabo also reports that because of his working hours, he cannot maintain friends or engage in social activities such as bushwalking.<sup>81</sup>

74. Mr Steiner relates that his hours of work interfere with his ability to spend time with his partner and that it can be difficult to see friends.<sup>82</sup> Mr Steiner also finds that working this pattern of work fatiguing, and spends his days off resting.<sup>83</sup> Ms Kinchin reported working very long days as a consequence of shifts being broken. She would work her eight paid hours over a span of up to 10 hours.<sup>84</sup>

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<sup>75</sup> Stanford, pp 24 – 25.

<sup>76</sup> Kinchin, [15].

<sup>77</sup> Kinchin, [19].

<sup>78</sup> Rathbone, [31].

<sup>79</sup> Rathbone, [33].

<sup>80</sup> Encabo, [34].

<sup>81</sup> Encabo, [35].

<sup>82</sup> Steiner, [18]

<sup>83</sup> Steiner, [9].

<sup>84</sup> Kinchin, [18].

## Paid Travel Time

### Previous Submissions relied upon by the ASU

75. The ASU relies on our Submission dated 2 July 2019<sup>85</sup> and our Submission in Reply dated 2 October 2019.<sup>86</sup>

### Court book, transcript and exhibits relevant to the claims

76. The following material is relevant to this claim:

<b>Parts of the Court Book, exhibits, and transcripts relevant to this claim</b>	<b>EX. no</b>	<b>Reference</b>
Expert Report of Dr Jim Stanford	ASU4	
Oral Evidence of Dr Jim Stanford		PN2216-PN2289
Court Book – Predictability and control in working schedules by Dr Olav Muurlink		CB 1686
Court Book - ELRR – Wage Theft, underpayment and unpaid work in marketised social care – by F McDonald, D Bentham and J Malone		CB 2772, Annexure A.
Witness Statement of Deborah Anderson dated 2 September 2019	ASU1	CB 1394
Court Book – Witness Statement of Augustino Encabo dated 13 February 2019		CB 1137
Court Book – Witness Statement of Richard Rathbone dated 13 February 2019		CB 1171
Court Book – Witness Statement of Tracy Kinchin dated 24 June 2019		CB 1190
Witness Statement of Robert Steiner dated 15 October 2019	ASU2	
Oral evidence of Robert Steiner		PN1534-PN1613
Court Book – National Disability Services – Australian Disability Workforce Report		CB 1828
Court Book – NDIS Costs Productivity Commission Paper		CB 1884
Court Book – NDIS Price Guide 2019-2020		CB 2796, p 12.
Business Equipment Industry F17s		
Oral evidence of Deborah Gaye Ryan		PN3050-3059
Oral evidence of Joyce Wang		PN3505-3517,

<sup>85</sup> CB, p 1036.

<sup>86</sup> CB, p 1126.

Findings Sought

77. Some disability services employees (employed under the SACS classification stream) do not have base location. They perform their work in a client’s home and locations where their client may need to be taken. Employers need, and arrange for, employees to travel between different locations in order for the employer to carry out their business. Disability support workers generally travel directly to their first client from home and back home after their last client. They rarely attend their employer’s premises. Disability support workers who provide in-home supports are required to hold a driver’s license as condition of employment expected to use their own car for work travel.<sup>87</sup> The Commission would find that this travel is work.
78. However, the Commission would also find that employers regularly break shifts so that work travel is done in unpaid breaks.<sup>88</sup>
79. Unpaid travel time, in conjunction with the absence of minimum engagements and broken shifts, means that employees can work over lengthy spans (up to 12 hours),<sup>89</sup> but the majority of that time may be unpaid. This unpaid time is still effectively controlled by the employer.
80. The evidence before the Commission tends to suggest that, particularly in regional areas, employers operate across large geographical areas. The capacity to work short engagements, and unlimited broken shifts, and not pay employees for travel to and from shifts, has the capacity to create a perverse incentive for employers to operate over greater distances than they otherwise might.<sup>90</sup>
81. Unpaid travel time thus reduces the already low wages of disability workers. As Dr Stanford explains the failure to compensate workers for this often-onerous travel time translates into a substantial reduction in effective compensation. Dr Stanford gives the following example:

*...if a part-time worker were required to attend to 4 different clients in the course of a day, with each visit compensated for one hour, and requiring 1 hour of travel or non-compensated down time between assignments 30 plus 30 minutes travel at each end of the day, then the worker spends a total of 8 hours time to perform 4 hours of compensated work. Thus their effective compensation per hour spent working or getting to work is cut in half relative to the nominal amount specified in the Award: to under \$11 per hour for a worker at the SACS Grade 1 level.<sup>91</sup>*

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<sup>87</sup> Anderson, Attachment A.

<sup>88</sup> Steiner, [14]; Kinchin [18]; Rathbone [17]; Encabo, [24].

<sup>89</sup> Steiner, [15]; Encabo, Annexure A.

<sup>90</sup> Steiner, [11] and Annexure A.

<sup>91</sup> Stanford, p 25-26.

82. The submission that it is too difficult to calculate the length of travel time is without basis. As noted above, disability services employers routinely set rosters and make agreements about regular patterns of work that break shifts so that only time spent directly with the client is paid time.<sup>92</sup> Several employer lay witnesses already pay for travel time.<sup>93</sup> For example, Ms Wang explains that CASS pays a travel allowance which is calculated based on details entered into a mobile application.<sup>94</sup>
83. NDIS Providers may claim up to 30 minutes for the time spent travelling to each participant in city areas, and up to 60 minutes in regional areas.<sup>95</sup> There is no probative evidence that our claim for paid travel time cannot be afforded by employers. No employer part has provided any modelling of the cost of our claim or provided any detail about the cost of paying for travel time.

#### *Equal remuneration*

84. The Commission would also find that unpaid travel time in disability services offends the principle of equal remuneration for work of equal or comparable value. Disability services are a sub-sector of the Social and Community Sector, which was found by the Full Bench in the 2011 Equal Remuneration Decision to be a female dominated industry.<sup>96</sup> At [253], the Full Bench made the following findings:

- (a) *much of the work in the industry is “caring” work;*
- (b) *the characterisation of work as caring work can disguise the level of skill and experience required and contribute, in a general sense, to a devaluing of the work;*
- (c) *the evidence of workers, managers and union officials suggests that the work, in the SACS industry, again in a general sense, is undervalued to some extent; and*
- (d) *because caring work in this context has a female characterisation, to the extent that work in the industry is undervalued because it is caring work, the undervaluation is gender-based.*

85. According to Dr Macdonald, the gendered character of caring work also has an impact on work practices. She concludes that:

*Non-payment of social care work is supported by the gendered legacy of care work as women’s work (Hayes, 2017; Palmer and Eveline, 2012). With care work*

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<sup>92</sup> Encabo, Attachment A; Rathbone, Attachment B; Kinchin, [18]; Steiner, [14]-[15].

<sup>93</sup> Transcript 17 October 2019 PN2612 [Jeffrey Sidney Wright]; Transcript 18 October 2019, PN2887-2890 [Graham Joseph Shanahan]; PN3050-3059 [Deborah Gaye Ryan]; PN3210-3213 [Wendy Mason].

<sup>94</sup> Transcript 18 October 2019, PN3505-3517, 3557-3558.

<sup>95</sup> Mark Farthing #2, [21]; NDIS Price Guide 2019-20, CB 2796, p12.

<sup>96</sup> *Equal Remuneration Case* [2011] FWAFB 2700, [253].

*continuing to be mainly performed unpaid by women in the family, it is often regarded as performed for altruistic reasons and as unskilled and not deserving of decent pay. These norms have a powerful role in social care, influencing employer strategies and also workers' preparedness to perform unpaid work. Furthermore, much social care work is performed in not-for-profit agencies that have long traditions and strong norms of volunteering that contribute to pressures on workers (Baines et al., 2017).<sup>97</sup>*

86. In male dominated industries, work travel is generally paid.<sup>98</sup> The ASU has presented the business equipment industry as an exemplary comparator. The sector is too small for there to be ABS data, but the F17's filed in the past five years record only 3 women employed at the time those agreements were made. The Commission should be satisfied that the business equipment industry is a male-dominated sector.
87. The only distinguishing characteristic between travel in industries with paid travel time and the disability services is that those sectors are male dominated.

### **Recall to work overtime away from the workplace**

#### Previous Submissions relied upon by the ASU

88. The ASU relies on our Submission dated 23 September 2019.<sup>99</sup>

#### Court book, transcript and exhibits relevant to the claims

89. The following material is relevant to this claim:

<b>Parts of the Court Book, exhibits, and transcripts relevant to this claim</b>	<b>EX. No</b>	<b>Reference</b>
Court Book – draft determination		CB 1124
Expert Report of Dr Jim Stanford	ASU4	
Oral Evidence of Dr Jim Stanford		PN2216-PN2289
Court Book – Predictability and control in working schedules by Dr Olav Muurlink		CB1686, pp 6, 11-12, and 17
Court Book - Statement of Emily Flett, dated 22 September 2019		CB1427
Statement of Deborah Anderson, dated 2 September 2019	ASU1	
Oral evidence of Deborah Anderson		PN981-1030

<sup>97</sup> Macdonald, CB2912-2913

<sup>98</sup> See Appendix A of the ASU's Submissions of 2 July 2019.

<sup>99</sup> CB, p 1082.

## Findings Sought

90. Employees in the social and community sector are regularly recalled work overtime without returning to a workplace (i.e. their employer's premises or a client's home). This work is carried out by use of electronic means of communication (telephones, lap top computers, etcetera.)
91. These employees tend to be employed in higher classifications (managers and experienced practitioners) that are rostered on call to provide managerial duties or specialist expertise out of hours. Many of these employees work part-time hours.
92. The Award does not clearly regulate how this work should be structured or remunerated. Employers do not take a consistent approach to paying employees for this work. Some employees simply pay for the time worked; other employees pay an allowance, and others pay employees a minimum engagement.
93. The incursion of work into personal time, such as on call or ad hoc work from home, has significant negative impacts on an employee's health and well-being.<sup>100</sup>
94. The negative impact of out of hours work is diminished, but not minimised, if the employee is rostered to be on call. These impacts come in three forms: the need to remain alert and available to work, the interference with work-life balance and the negative impact on sleep.
95. In his review of the literature, Dr Muurlink explained that the unique negative impacts of on-call work appear to be related to the requirement to remain alert and available to being called to work, and not surprisingly, this requirement impacts on sleep.<sup>101</sup> On-call work requires the worker to subsume control over lifestyle choices to allow the ability to respond to work requirements, limiting behaviours to activities that would not interfere with their ability to work. This means that employees must often remain in their homes to be ready to respond to a request to work.
96. Deborah Anderson, a disability support worker, explained:
- When I am on call, I cannot leave my home as I need to have phone, internet and computer access. I must also be ready and able to respond to any requests for work. I cannot go anywhere nor do anything else. This is particularly difficult on weekends when doing an on call shift from 9am until 9am. This causes high anxiety for me as I could be called out to any site to handle difficult incidences.*<sup>102</sup>
97. Dr Muurlink reports that on-call work has been linked with work-life imbalance, and the impact is particularly strong for women— and thus has particular relevance to the care sector, where

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<sup>100</sup> Muurlink, pp 4-6, 17.

<sup>101</sup> Muurlink, p 11.

<sup>102</sup> Anderson, [24].

there is a significant continuing gender imbalance in favour of women. This is especially relevant to the SCHDS Award, given the gendered nature of the SCHDS Industry.

98. Further, being on-call has a negative impact on sleep. Dr Muurlink notes that those on-call were more likely to report sleep related problems. This is confirmed by laboratory evidence that being 'on call' appears to equate to being vigilant: the apprehension of being woken up impacts on quality of sleep. This includes significant increases in irritation and a reduction in mood and social activities, household activities, and low effort activities.<sup>103</sup>

99. Ms Flett, stated:

*The following day after a night shift I can't do the things I like to do. I cannot exercise at a high level, my balance is affected, I cannot ride my motorbike or my pushbike. I also find it harder to engage with my partner, friends and family. I find that I don't have the energy to socialise, so I tend to withdraw a little bit and miss out.*<sup>104</sup>

100. Being recalled to work from home does not fully ameliorate the negative impacts of working being recalled to work. Dr Muurlink notes that that being on-call at home could be, if anything worse than being on-call at other locations, possibly because the presence of family interfered with the worker's ability to implement sleep patterns that would conform with on-call requirements.

101. Ms Flett explains that she finds working an on-call shift is '*different from working a shift when you are awake through the night*'. She states that after a night on call '*you just feel like you are jetlagged as you have only slept in parts and will need to sleep again later in the day once morning duties are finalised and you go off shift*'.<sup>105</sup> Further, Emily Flett has deliberately avoided living with her long term partner because of her working patterns. When she is on-call, they cannot share the same bed, because her working patterns would disrupt his sleep. Sharing a bed, and by inference a home, would be unfair to him because '*he would just be on call with me*'.<sup>106</sup>

102. The main reason why employees agree to work on call is to maximise their income. Both Ms Anderson and Ms Flett report that they are a paid a minimum engagement of two hours for each time they are contacted.<sup>107</sup> They both explain that if they were paid less than this, it may mean that they would choose not to work on call.<sup>108</sup> This is a significant concern for the

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<sup>103</sup> Muurlink, p 11-12.

<sup>104</sup> Flett, [22].

<sup>105</sup> Flett, [21].

<sup>106</sup> Flett, [23].

<sup>107</sup> Flett, [16]; Anderson, [22].

<sup>108</sup> Flett, [25]; Anderson, [25]-[27].

disability service sector, which as Dr Stanford has noted, is having trouble retaining existing skilled and experienced staff.<sup>109</sup>

### III – CLAIMS OPPOSED BY THE AUSTRALIAN SERVICES UNION

#### Roster variations

##### Previous Submissions relied upon by the ASU

103. The ASU relies on our Submission dated 16 September 2019.

##### Court book, transcript and exhibits relevant to the claims

104. The following material is relevant to this claim:

<b>Parts of the Court Book, exhibits, and transcripts relevant to this claim</b>	<b>EX. no</b>	<b>Reference</b>
Expert Report of Dr Jim Stanford	ASU4	
Oral Evidence of Dr Jim Stanford		PN2216-PN2289
Court Book – Predictability and control in working schedules by Dr Olav Muurlink		CB 1686
Court Book – Statement of Augustino Encabo dated 13 February 2019		CB 1137, [19]- [21]
Court Book – Statement of Richard Rathbone dated 13 February 2019		CB 1171
Court Book – Statement of Tracy Kinchin dated 24 June 2019		CB 1190
Statement of Robert Steiner dated 15 October 2019	ASU2	
Court Book - Statement of Emily Flett, dated 22 September 2019		CB 1427, [14], [19]-[20].

##### Findings Sought

105. Further, there is no evidence at all of any need for the proposed variation. The Employer witnesses tend not to discuss the proposed variation in their evidence. The Commission should infer that this is because the Award is already sufficiently flexible to meet the employer's needs. Aside from the flexibilities discussed above, the industry is able to draw on a large and growing pool of casual employees.<sup>110</sup> If all else fails, an employer would be able to ask a casual employee to fill a short notice need for labour.

<sup>109</sup> Stanford Report, pp 11-12, 19.

<sup>110</sup> Stanford, [12].



106. The Commission would find that roster changes are already frequent under the terms of the current Award for disability services employees. Employees in the social and community sector are committed to their work, their clients and the business of their employers. Under the current terms of the award, they often feel pressure to accept roster changes, such as additional hours, to ensure that their client's needs are met. Despite the disruption caused by the roster variations, employees in the sector are usually willing to accept changes to the rosters unless there is a pressing reason why they would refuse.<sup>111</sup>

107. Emily Flett, explains that:

*I am worried if rosters could be changed by agreement at any time, I would be pressured to change my shifts to accommodate employer. We have a sense of duty to keep this place running. A good example of this was in April 2019. Anglicare Victoria had restructured the on call team to centralise work that was done by the regional North West After Hours team in the Collingwood office. This required roster changes. We felt incredible pressure to adhere to whatever the organisation told us they needed to do, even if it would cause us problems. We just tried to adapt and have come across to the central roster. We have all lost income doing this, we are now working more nights for less money.<sup>112</sup>*

108. The Commission would find that Award is already so flexible already that many workers report unpredictable working hours. The Commission would also find that unpredictable working hours have a significant impact on their health and wellbeing.

109. Relevantly, Dr Muurlink explains that there are two very different ways of looking at non-standard working schedules. Firstly, he describes 'variability', which reflects employer control over working hours designed to respond to the evolving requirements of the business and service sector. He contrasts employer-controlled variability, with 'flexibility'. This refers to individual workers discretion and autonomy to adjust working hours to reduce work/life conflict and better accommodate other activities needs and responsibilities. The two concepts have an almost opposite relationship with employee control, variability tending to reduce it, flexibility tending to increase it. Flexibility is thus often associated with employee wellbeing, while variability is high on the list of desired employer outcomes.

110. In his review of the literature, Dr Muurlink noted that unpredictability and variability in hours of work has a significant impact on the health and wellbeing of employees.<sup>113</sup> Where work becomes unpredictable, employees are less able to engage in positive health behaviours, such as team's sports and family meal times. There is also an increase in unhealthy behaviours such as alcohol consumption and smoking. Unpredictable hours of work also have

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<sup>111</sup> Flett, [20]; Encabo, [19]-[21]; Rathbone, [19]-[21]; Kinchin, [17].

<sup>112</sup> Flett, [20].

<sup>113</sup> Muurlink, p 3.

a psychological impact on employees.<sup>114</sup> Relevantly, Dr Muurlink Reports that an employee's perception of their control over working hours can have '*significant and measurable effects on health outcomes*'.<sup>115</sup> Lack of control, when combined with the strain of work, is the cause of stress. High strain work and a lack of job control (the circumstances of disability support workers) are associated with a broad range of negative health outcomes. This ranges from the physical, heart disease, to the psychological, depression.<sup>116</sup> However, increasing control over working hours can have positive effects on health and wellbeing.<sup>117</sup>

111. Dr Muurlink's findings are reflected in the qualitative research of Dr Stanford and the evidence of the ASU's lay witnesses.<sup>118</sup>
112. The Commission would find that the proposed variation would increase the power of employers to arbitrarily control working time (variability), while decreasing the control of employees over their hours of work (flexibility). The proposed variation would reduce the control that employees have over their working hours, and thus make the already intolerable working conditions in the sector worse. It is likely that the proposed variation would exacerbate the disability services' difficulties in attracting and retain staff.

#### **Client cancellation**

##### Previous Submissions relied upon by the ASU

113. The ASU relies on our Submission dated 16 September 2019, [25] to [43].

##### Court book, transcript and exhibits relevant to the claims

114. The ASU relies on the following material:

<b>Parts of the Court Book, exhibits, and transcripts relevant to this claim</b>	<b>EX. no</b>	<b>Reference</b>
Expert Report of Dr Jim Stanford	ASU4	
Oral Evidence of Dr Jim Stanford		PN2216-PN2289
Court Book – Predictability and control in working schedules by Dr Olav Muurlink		CB 1686
Further statement of Mark Farthing dated 16 September 2019	HSU2	[6]-[10], [23]-[32]
NDSI Price Guide 2020		CB 2796, pp 12-13.
Witness Statement of Scott Harvey dated 2 July 2019		CB 162, pp 166.

<sup>114</sup> Muurlink, pp 4-5.

<sup>115</sup> Muurlink, p 6.

<sup>116</sup> Muurlink, p 7.

<sup>117</sup> Muurlink, p 8.

<sup>118</sup> Stanford, pp 14-15; Encabo, [18]-[27], [32]-[36]; Rathbone, [16]-[22]; Kinchin, [17]; Steiner, Attachment A.

Oral evidence of Scott Raymond Harvey	ABI17	PN3117-3140
Witness Statement of Steven Miller	NDS2	CB 4408.
Oral Evidence of Steven Miller		PN1992-PN2081
Witness Statement of Joyce Wang		CB200
Oral evidence of Joyce Wang		PN3554-3568

### Findings Sought

115. There is no probative evidence that identifies any need for a client cancellation term in the disability services.
116. Employer witness evidence that they will lose clients if they charge for cancellation of a service is speculative and should be given little weight.
117. No employer has been able to quantify the cost of client cancellations to their business. Any witness evidence about the cost of client cancellation is purely speculative and should be given no weight. The employer witness evidence demonstrates that employers in the disability services are better placed to manage the risk of cancellation and absorb the unquantified costs of cancellation than their employees.
118. ABI called Mr Harvey, the Operations Manager for the NDIS provider Connectability, but his none of his evidence placed the alleged burden of client cancellation in context by setting out details of the financial position of the organisation.<sup>119</sup>
119. NDS called Mr Miller, Head of Operations, Service Delivery, at the Endeavour Foundation. Mr Miller could not provide any detail to put his claims about the financial impact of client cancellation on his business.<sup>120</sup> However, in addition to funding derived from providing NDIS services, the Endeavour Foundation derives income from supported employment services and a lottery.<sup>121</sup> The Endeavour Foundation's Annual Report for 2017-2018 proves it is in good financial health and has produced surpluses almost every year since 2014.<sup>122</sup> Ms Wang's evidence, from the NDIS provider CASS Care Limited, demonstrates that work and funding arrangements have changed since the introduction of the NDIS, but does not show any financial difficulties. Like Mr Miller and Mr Harvey, should could not quantify the cost of client cancellation or explain its impact on the broader business.<sup>123</sup>
120. Funding arrangements for the NDIS allow employers to recover the majority of the cost of cancelled shifts. For shifts of less than eight hours duration or worth less than \$1000.00, the provider is entitled to recover 90 percent of the fee for the cancelled service unless they

<sup>119</sup> CB, 166.

<sup>120</sup> Transcript PN2028-PN2035.

<sup>121</sup> Transcript 17 October 2019, PN 2016-2017 [Steven Miller].

<sup>122</sup> ASU3.

<sup>123</sup> Transcript 18 October 2019, PN 3463 to 3479 [Joyce Wang].

receive notice of *'two clear business days'*. From the sparse evidence provided by the employers, the majority of cancellations occur at very short notice. For all other services, employers may charge 90% of the cost of the service unless 5 clear business days' notice is given.<sup>124</sup> Providers may claim an unlimited number of cancellations.<sup>125</sup>

121. The effects of unpredictable working hours have already been discussed previously in this submission. The Commission should be satisfied that the proposed variation would further reduce the control that employees have over their working hours, and thus make the already intolerable working conditions in the sector worse.

#### **Remote Response and Recall to Work Overtime**

122. This matter is dealt with in the section dealing with the ASU's claim regarding recall to work overtime away from the workplace.
123. We note that ABI filed an amended draft determination in respect of their remote response and recall to work overtime clause. Our submissions of 16 September 2019 remain relevant to the amended draft determination. The ABI draft determination does not provide an appropriate rate of payment to employees who are recalled to work overtime away from the workplace. It is also a complicated provision that will be difficult to implement in practice.

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<sup>124</sup> Farthing, [6]-[10], [23]-[32]; Transcript 18 October 2019, Transcript PN3118-3127 [Scott Raymond Harvey].

<sup>125</sup> NDIS Price Guide 2019-2020, CB 2796, pg.12-13.